PETALING TIN BERHAD

v.

LEE KIAN CHAN & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[ORIGINATING SUMMONS NO. D1-24-201-91]
14 OCTOBER 1993

COMPANY LAW: Declarations sought to validate refusal to register transfers of shares - Parties acting in concert - Acquisition of more than 33% of voting rights in company - Refusal of company to register transfer of shares - Operation of r. 34.(1)(a) & 34.7 of Code on Takeovers and Mergers - Non-compliance of Rule - Sanctions imposed by Panel on Takeovers and Mergers - Public Censure - Whether the imposition of the sanction upon the parties has the effect of releasing them from complying with the Rules.

JURISDICTION: Panel on Takeovers and Mergers - Whether its decisions and rulings subject to judicial review by the court.

The plaintiff (P) sought various declarations from the High Court with regard to its shares held by the 3 defendants abovenamed. The 3rd defendant (D3) was a registered shareholder, holding as nominee shares of the plaintiff for the 1st & 2nd defendant. P in its first and second prayers in the originating summons application asked for declarations that it was under a legal duty to refuse the registration of certain transfers of its shares from the nominee shareholder (D3) holding for (D1) & (D2) to third parties. The third and final prayer, which forms the whole of the judgment, is for a declaration that the decision of the Malaysian Panel on Takeovers and Mergers ("the Panel") on the applicability of r. 34 to the parties continues and must be complied with.

The salient facts of the case are as follows. One Hijaz Industries (M) Sdn. Bhd. & D1 & D2 had acquired shares in P carrying in excess of 33% of the voting rights. The Panel ruled on 23 February 1991 that Hijaz had been acting in concert with D1, D2 & several others and therefore under rule 34.1(a) of the Code on Takeovers and Mergers ("the Code") the parties were under an obligation to extend a mandatory general offer to the other shareholders of P. Hijaz appealed and the Panel deferred its decision but ordered compliance with r. 34.7 in the interim. On 20 May 1991 the Panel affirmed its decision on the mandatory general offer.

On 19 July 1991, D1 attempted to transfer his shares from his nominee D3 to a third party. D1 had failed to obtain the Panel's consent as to the transaction. The Panel on 6 August 1991 invoked s. 179(7A) of the Companies Act 1965. The Panel imposed the sanction of publicly censuring the concert parties on 8 August 1991.

The issue before the court was whether the obligation to extend a mandatory general offer and r. 34.7 of the Code still applied in view of the public censure which had been imposed by the Panel. The Panel on 5 September 1991 presented its opinion that as s. 179(7A) of the Companies Act 1965 had been enforced against the concert parties, r. 34.7 no longer was operable against them. The plaintiff disagreed and refused to register certain share certificates which D1 and D2 had sold to third parties subsequent to the public censure.

Held:

[1] The decision on the third prayer in the originating summons would invariably also determine the first and second prayers.

The law is clear that the Panel has the sole power to administer the Code for all take-over and merger transactions. The sanction imposed by the Panel, i.e. the public censure, in effect wipes out the non-compliance by the parties in concert of their adherence to the particular rules which came into operation. The Panel, in expressing its view that public censure meant that the parties need not comply with r. 34.7 was not merely giving its opinion on the effect of the public censure but was actually making a ruling and a decision which it had the power to do under s. 179(4)(a) and s. 179(7A) of the Act.

[2] The English authorities on the decisions of the Panel of Take-overs and Mergers in England are disregarded as subsections (4) to (9) of s. 179 of the Companies Act are not included in the relevant English legislation.

[3] Furthermore, the discretion to grant a declaration cannot be exercised where it affects a party who is not a party to the action, namely the Panel. The court would also refuse a declaration where a dispute is a non-justiciable dispute. The present case does not amount to being a justiciable dispute as the Code is more a gentleman's guide to self-discipline and

concerned with the observance of good business ethics for the conduct of takeovers and mergers rather than with the enforcement of the law. Therefore, the question is whether a body like the Panel is subject to judicial review and the test is the source of its power. Its corollary is the Kuala Lumpur Commodity Exchange and caselaw relating to the Exchange's decisions on a certain Act has held that the body should not be made amenable to judicial review. To hold that the Panel is subject to the supervisory function of the court would be to extend the jurisdiction that was never intended by Parliament when it provided for the establishment of the Panel and the formulation of the Code.

There is no merit in the third prayer and thus no necessity for the granting of the first and second prayers.

[Application dismissed with costs].

Cases listed at the end of the judgment as "Cases referred to":

In re Fry, Deceased; Chase National Executors & Trustees Corporation v. Fry [1946] 1 Ch. 312
In re Rose; Midland Bank Executor & Trustee Co. Ltd. v. Rose [1949] 1 Ch. 78
Re Lee Phee Soo, Decd. [1960] 26 MLJ 75
Dunlop Malaysia Industries Bhd. v. Pernas-Sime Darby Sdn. Bhd. & Ors. [1985] 2 MLJ 101
Central Securities (Holdings) Bhd. v. Haron bin Mohamed Zaid [1979] 2 MLJ 244
Re Fraser & Neave Ltd.; Tan Keng Siong v. Tan Hock Kiang & Ors. [1967] 2 MLJ 282
Re the East Wheel Martha Mining Company [1863] 33 BCav. 312
Re the Bahia and San Francisco Railway Co. Ltd. [1868] LR 3 QB 584
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1963] 3 WLR 101
Neogh Soo On & Ors. v. G. Rethinasamy [1983] 2 CLJ 218 / [1984] 1 MLJ 126
In re Ottos Kopje Diamond Mines, Ltd. [1893] 1 Ch. 618
Moore v. North Western Bank [1891] 2 Ch. 599
Enesty Sdn. Bhd. v. Transport Workers Union & Anor. [1986] 1 MLJ 18
Roxy Electric Industries (M) Bhd. v. Syarikat Nominee Bumiputra Sdn. Bhd. & Ors. [1989] 2 CLJ 657 / [1989] 1 MSCLC 90,326
MBf Holdings Bhd. v. Emtex Corporation Bhd. [1985] 1 MLJ 477
South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors. [1980] 2 MLJ 165
Anisminic Ltd. v. Foreign Compensation Commission & Anor. [1969] 2 WLR 163
Hockey v. Yelland & Ors. [1984-1985] 157 CLR 124
Ex parte Waldron [1985] 3 WLR 1090
Pearlman v. Keepers & Governors of Harrow School [1978] 3 WLR 736
Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1984] 2 CLJ 6 / [1984] 1 MLJ 363
Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor. [1985] 1 CLJ 16 / [1985] 2 MLJ 297
R v. Panel on Take-overs and Mergers; ex parte Datafin plc [1987] 2 WLR 669
Re Barnato [1949] 1 AER 268
Majumder v. A.G. Sarawak [1967] 1 MLJ 101; [1969] 1 MLJ 132
London Passenger Transport Board v. Moscrop [1942] 1 AER 97
Eshah bte. Sa'at v. Meriam bte. Sa'at [1975] 1 MLJ 97
Sungei Wangi Estate v. Uni [1975] 2 MLJ 136
Electrical Industry Workers Union v. Registrar of Trade Unions [1976] 1 MLJ 177
Dyson v. Attorney General [1911] 1 KB 410
Re Clay [1918] 1 Ch. 66
Karpal Singh v. Sultan of Selangor [1987] CLJ 342 / [1988] 1 MLJ 64
Cox v. Green [1966] 1 AER 268
Re Sidebotham [1880] 14 Ch. D. 458
Buxton & Ors. v. Minister of Housing & Local Government [1960] 3 AER 408
Syarikat Perkapalan Selatan Sabah Sdn. Bhd. v. Sabah State Government [1991] 2 CLJ 1029 / [1991] 1 MLJ 370
The Government of Malaysia v. Lim Kit Siang [1988] 1 CLJ 219 / [1988] 2 MLJ 12
Lim Cho Hock v. Government of the State of Perak [1980] 2 MLJ 148
Tan Sri Haji Othman Saat v. Mohd. bin Ismail [1982] 2 MLJ 177
Ganda Oil Industries Sdn. Bhd. v. Kuala Lumpur Commodity Exchange [1988] 1 CLJ 126 / [1988] 1 MLJ 174
New Zealand Stock Exchange v. Listed Companies Association [1984] 1 NZLR 699

Legislation referred to:

Companies Act 1965, ss. 69, 179(2), (3)(a), (4)(a), (7), (7A), (8), (9)
Malaysian Code on Take-overs and Mergers, r. 34 1(a), 7
Rules of the High Court 1980, O. 15 r. 16
Rules of Supreme Court, O. 15 r. 17 (UK)

Other sources referred to:

Declaratory Orders, P.W. Young, Chapter 5

For the plaintiff - W.S.W. Davidson (H.Y. Chong with him); M/s. Azman Davidson & Co.
For the first and second defendants - M.S. Murthi; M/s. Murthi & Partners
For the third defendant - Ong Chin Beng; M/s. Ong Chin Beng & Partners

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:
It is appropriate to mention at the outset that this matter had been referred back to the High Court by the Supreme Court on 3 September 1992 when it allowed the appeal by the plaintiff against the decision of the High Court on 27 March 1992 dismissing the plaintiff's originating summons upon the defendants' preliminary objection that the High Court had no jurisdiction to hear the application in view of s. 179(8) of the Companies Act 1965 (hereinafter "the Act"). In that same order, the Supreme Court had directed that the matter be heard on the merits by another High Court Judge.

Before me, all parties had agreed that the matter could be disposed of by arguments alone which they did and apart from their oral submissions, they had relied on their written submissions both at the previous hearing on the matter and at the appeal stage. Having considered their effective enunciation of the problem, it was my considered view that the originating summons should be dismissed with costs.

Turning first on the facts which were not disputed, the plaintiff is a public listed company and the third defendant a registered shareholder holding as nominees certain shares of the plaintiff for the first and second defendants. The originating summons had been filed on 11 October 1991 asking for a declaration:

(a) that the plaintiff is under a legal duty to refuse to register a transfer of two thousand shares, owned by the first defendant, from the third defendant to Ng Seng Yuen under a transfer dated 12 July 1991 and presented to the plaintiff on 19 July 1991;
(b) that the plaintiff is under a legal duty to refuse to register a transfer of two hundred fifty thousand shares, owned by the second defendant, from the third defendant to Mayban Nominee (Singapore) Pte. Ltd. under transfers dated 30 September 1991 and presented to the plaintiff on 3 October 1991;
(c) that the decision of the Malaysian Panel on Takeovers and Mergers (hereinafter "the Panel") on 23 February 1991 and 20 May 1991, that r. 34 of the Malaysian Code on Take-overs and Mergers (hereinafter "the Code") applied to the issued share capital of the plaintiff, continues to apply.

In their supporting affidavit, the plaintiff through its Chairman of the Board of Directors had averred that the plaintiff had an issued share capital of 10,084,206 stock units at RM1 each and that on or about 23 June 1990 Hijaz Industries (M) Sdn. Bhd. (hereinafter "Hijaz") had completed the purchase of a block of shares comprising 3,023,262 units or 29.98 per cent of the issued share capital and issuing rights of the plaintiff. The plaintiff had further stated that between 23 June 1990 and 23 August 1990, there was heavy buying of shares in the plaintiff and Hijaz's solicitors had written to the plaintiff demanding further representation on the plaintiff's Board of Directors that would effectively give Hijaz control of the Board.

The plaintiff had also deposed that pursuant to inquiries made by its Secretary under s. 69 O of the Act, details of the beneficial owners of shares in the plaintiff were obtained. The third defendant had stated that it held 304,000 shares beneficially for the first defendant and 316,000 shares for the second defendant. Representations were subsequently made by the plaintiff's solicitors to the Panel that Hijaz and various concert parties namely the first and second defendants had acquired shares in the plaintiff carrying in excess of 33 per cent of the voting rights and that the Code had been triggered.

On 23 February 1991, the deponent had added, the Panel had ruled that Hijaz had been acting in concert with the first and second defendants and six other named individuals and that, under r. 34.1(a) of the Code, they were under an obligation to extend a mandatory general offer to the other shareholders of the plaintiff. Upon Hijaz's appeal that the Panel reconsider its decision as the shareholding had been reduced in the meantime to below the 33 per cent level, the Panel on 10 April 1991 had deferred its decision as to whether the concert parties were required to extend a mandatory general offer but they were directed to comply with rule 34.7 of the Code in the interim. On 20 May 1991, the Panel ruled that the concert parties were not released from their obligation to extend a mandatory general offer.

The supporting affidavit had went on to state that on or about 19 July 1991, the plaintiff had received transfer forms dated 12 July 1991 for the transfer of two thousand shares, beneficially owned by the first defendant, from the third defendant, who is the nominee share-

holder of both the first and second defendants, to one Ng Seng Yuen. The plaintiff had on 25 July 1991 written to the third defendant inquiring whether the Panel's consent had been obtained for the transfer. As a result, the concert parties had been publicly censured on 8 August 1991. It is appropriate to reproduce the said public censure:

Panel Mengenai Pengambilalihan
dan Percantuman
[Panel on Take-Overs & Mergers]

Unit Perancang Ekonomi,
Jabatan Perdana Menteri,
Jalan Dato' Onn
50502 Kuala Lumpur
Tel. 2300133

Public Censure

The Panel on Take-Overs and Mergers (TOP) upon due investigation, is satisfied that the following persons acted in concert in the context of The Malaysian Code on Take-Overs and Mergers, 1987 (The Malaysian Code) with regard to the acquisition of 36.52% of the voting rights in Petaling Tin Berhad:

Hijaz Industries (M) Sdn. Bhd.
Dato' Zulkifli Kamaruddin
Lee Kian Chan
Ong Tee Kein
Malaysian Vicose Sdn. Bhd.
Mohd. Sharif Saidin
Dr. Abdul Razak Abdul
Megat Fairuz Junaidi Dato' Megat Junid
Tengku Azman Shah Ibni Almarhum
Sultan Hishamuddin Alam Shah

The abovementioned persons had increased their voting rights from 29.98% to 36.52% by the acquisition of an additional 661,000 shares representing 6.54% of the voting rights of Petaling Tin Berhad (Petaling) in the open market for the period between June to August 1990.

The acquisition had triggered r. 34.1(a) of the Malaysian Code which required them to extend, within a reasonable period of time, an offer on the balance of the voting rights in Petaling not held by them. They had failed to extend the mandatory offer.

Accordingly, TOP under the provision of s. 179(7A) of the Companies Act 1965 hereby wish to publicly censure the abovementioned persons.

For and on behalf of
The Panel on Take-Overs and Mergers

(sgd.)

(Siti Hadzar bte Mohd Ismail)
Secretary,
Panel on Take-Overs and Mergers

6 August 1991.

The first and second defendants had respectively written to the plaintiff on 13 August 1991 and 12 August 1991 stating their belief that the public censure by the Panel meant that r. 34.7 of the Code was no longer applicable. On 21 August 1991, the plaintiff wrote to the Panel seeking clarification as to the obligation to extend a mandatory general offer and the applicability of r. 34.7 of the Code. On 5 September 1991, the Panel expressed the view that as s. 179(7A) of the Act had been enforced by them, r. 34.7 of the Code was no longer applicable.

On 3 October 1991, the plaintiff received transfer forms dated 30 September 1991 for the transfer of two hundred and fifty thousand shares, beneficially owned by the second defendant, from the third defendant to Mayban Nominees (Singapore) Pte. Ltd. The plaintiff wrote to the third defendant to inquire whether consent for the transfer had been obtained from the Panel. Both these events had taken place after the plaintiff's solicitors had written to the Panel to state that despite the Panel's ruling on 5 September 1991, the plaintiff was taking the matter to court to seek a declaration on the ruling.

According to the first and second defendants, they had purchased shares in the plaintiff in the open market sometime in late 1990. Hijaz had purchased the 29.98 per cent of the shares owned by the State Government of Selangor through its investment company in the capital of the plaintiff. At that time, the majority of the Board of Directors were keen to invest in a mining project in China which plan was opposed by the directors forming the minority. Hijaz's representative had then taken out an interim injunction to restrain the majority who controlled the Board from Proceeding with the China investment. Hijaz had also obtained a court appointed general meeting to revoke the China investment policy but they had lost by a narrow margin.

While this was going on, the plaintiff's solicitors reported to the Panel that a group of minority shareholders together with other parties had

acquired control of 33 $^{1}/_{3}$ per cent of the voting rights in the plaintiff's capital. The Panel on 23 February 1991 had ruled that this minority group was acting in concert. This ruling was protested against but the Panel adhered to it and directed the minority group to make a general offer to the rest of the shareholders. However, this they could not do.

Subsequent to this, the Panel on 6 August 1991 had invoked s. 179(7A) of the Act which states

> Notwithstanding subsection (7), where any party concerned in a take-over or merger transaction fails to observe any of the general principles and rules in the Code, the Panel may, after giving the party an opportunity to be heard, invoke such sanction as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange as it deems fit.

In the instant case, the Panel had publicly censured the group acting in concert. Following the public censure, the first and second defendants had decided to liquidate their shares in the plaintiff and accordingly sold them in the open market. When the share certificates were presented for registration, the plaintiff had declined to register the transfer.

The crux of the problem was that the first and second defendants took the view that as they had been punished by the Panel by public censure, the restriction of r. 34.7 of the Code had ceased to operate. The plaintiff of course took the opposite view.

By letter dated 21 August 1991, the plaintiff had sought the ruling of the Panel and the reply from the Panel on 5 September 1991 reads as follows:

> Unit Perancang Ekonomi
> Economic Planning Unit
> Jabatan Perdana Menteri
> Prime Minister's Department
> Jalan Dato' Onn
> 50502 Kuala Lumpur
> Malaysia
>
> Ruj. Kami: (81)dlm.UPE 3/1/3624 Vol. 2
>
> Tarikh: 5 September 1991
>
> Tetuan Azman, Davidson & Co.,
> Peguambela dan Peguamcara,
> Lot 14.08, Tingkat 14,
> Wisma Stephens,
> Jalan Raja Chulan,
> 50200 Kuala Lumpur.
>
> Tuan,
>
> Petaling Tin Berhad
>
> Saya diarah merujuk surat tuan bil. WSWD/FT/bk/303/90P bertarikh 21 Ogos 1991 mengenai perkara yang tersebut di atas dan memaklumkan bahawa oleh kerana Hijaz Industries (M) Sdn. Bhd. dan pihak-pihak yang bertindak bersama-sama dengannya (pihak yang bertindak bersama) telah gagal untuk melaksanakan tawaran am mandatori ke atas Petaling Tin Berhad di bawah Kaedah 34.1(a) Kod Malaysia Mengenai Pengambilalihan dan Percantuman (Kod Malaysia), Panel Pengambilalihan dan Percantuman (Panel on Take-overs and Mergers - TOP) telah memutuskan untuk menguatkuasakan Seksyen 179(7A) Akta Syarikat 1965 ke atas pihak yang bertindak bersama dengan mengenakan Celaan Awam yang telah pun diumumkan pada 8 Ogos 1991. Sesalinan notis tersebut dikepilkan untuk makluman tuan.
>
> Memandangkan TOP telah menguatkuasakan Seksyen 179(7A) Akta Syarikat 1965, oleh itu Kaedah 34.7 Kod Malaysia adalah tidak lagi terpakai.
>
> Sekian.
>
> "Berkhidmat Untuk Negara"
>
> Saya yang menurut perintah,
>
> (sgd.)
>
> (Hanifah bt. Hassan)
> b.p. Setiausaha,
> Panel Pengambilalihan dan Percantuman,
> Malaysia.

The substantive issue before the court, as far as the plaintiff is concerned, is whether the imposition of the public censure by the Panel on the parties in concert for the failure to make a general offer has the automatic legal effect of releasing the parties in concert from their obligations and restrictions under r. 34.1 and 34.7 of the Code, as the defendants and the Panel contend, or whether the obligations and restrictions continue notwithstanding the public censure until the general offer is made or the Panel releases the parties in concert from their obligations, as the plaintiff contends.

At the earlier hearing, the learned trial Judge did not make any decision on the substantive issue as he had made a finding that the matter could not be brought before the court in the first place. In his judgment, he had concluded

> It is therefore my view that the words in s. 179(8) coupled with ss. 179(2), (4)(a) and (9)

makes it clear that the decision of the Panel in the exercise of its functions in respect of the general principles and rules in the Code shall be final and not capable of being challenged in the courts. The plaintiff's application for declaration is hereby dismissed with costs.

This finding of course did not find favour with the Supreme Court who had ruled that s. 179(8) of the Act did not prevent the High Court from hearing the originating summons.

Certain subsections of s. 179 of the Act need to be highlighted in considering the substantive issue namely:

(1) xxx

(2) The Minister may, by order, appoint a Panel On Take-Overs And Mergers (hereinafter referred to as "the Panel") consisting of such persons as he thinks fit to administer, supervise and control take-overs and mergers.

(3)(a) The Panel may prepare a code containing general principles and rules to be complied with by all parties concerned in a take-over and merger transaction (hereinafter referred to as "the Code") and may from time to time amend the Code in any manner it deems fit.

(b) xxx

(4) The Panel shall administer the Code and may do anything necessary for the proper exercise of its functions, including but not restricted to the following:

(a) issue rulings, from time to time, on the interpretation of the general principles and rules;
(b) xxx
(c) xxx
(d) xxx
(e) xxx

(5)(a) xxx
(b) xxx
(c) xxx

(6) xxx

(7) Subject to subsection (5), a failure by any party concerned in a take-over or merger transaction to observe any of the general principles and rules in the Code shall not of itself render that party liable to criminal proceedings but any such failure may, in any proceedings, whether civil or criminal, be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in the proceedings.

(7A) Notwithstanding subsection (7), where any party concerned in a take-over or merger transaction fails to observe any of the general principles and rules in the Code, the Panel may, after giving the party an opportunity to be heard, invoke such sanction as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange as it deems fit.

(8) The acts and decisions of the Panel in the exercise of its functions in respect of the general principles and rules in the Code shall be final and not capable of being challenged in any court.

(9) Neither the Panel nor any member of the Panel or its secretariat shall be liable to any legal proceedings in respect of anything done or omitted to be done by it or him in the exercise of its or his functions, duties and powers under this section or the general principles and rules in the Code.

To my mind, it is abundantly clear that it is the Panel that has been given full power to administer, supervise and control take-overs and mergers through the Code approved by the relevant Minister and included in the Panel's powers are its powers to issue rulings on the interpretation of the general principles and rules of the Code. It is also not disputed that where there has been non-observance of the general principles and rules of the Code, the Panel may invoke such sanction as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange.

Of the three prayers asked for by the plaintiff in the originating summons, it is relevant to discuss the third prayer first as the decision on that prayer would invariably also determine the first and second prayers. On 23 February 1991, the Panel had directed Hijaz and the other parties acting in concert to submit within three weeks of that date the schedule of execution of the mandatory general offer and the copies of the contract notes for the transfer of the shares obtained by the named parties in concert. The next relevant decision of the Panel is by their letter dated 10 April 1991 but for some unexplained reason, it is not included in the plaintiff's third prayer. For the record, the Panel had rejected Hijaz's appeal to reconsider its earlier decision, although Hijaz had maintained that the other acquisitions of shares were without their knowledge and consent, and had postponed its decision whether Hijaz and the other

parties acting in concert were required to execute the mandatory general offer on the balance of the voting shares in the plaintiff, and that in the meantime they were to comply with r. 34.7 of the Code.

The second decision named in the third prayer, which is actually the third decision of the Panel in this matter, is on 20 May 1991, where the Panel had decided as follows:

(a) although the shares held by the parties in concert had been reduced from 36.52 per cent to 31.57 per cent, this did not release the parties in concert from the mandatory general offer;
(b) the parties acting in concert were to submit within three weeks of that date the schedule of execution of the mandatory general offer and the copies of the contract notes for the said acquisitions.

In that same letter, the Panel had also ruled that if the parties acting in concert failed to execute the mandatory general offer, they were required within three weeks from the date of that letter to give reasons why the Panel should not enforce the provisions of s. 179(7A) of the Act. We now know that as the parties acting in concert had failed to extend the mandatory offer, they had been publicly censured under the relevant provision on 6 August 1991.

In my view, this sanction at the discretion of the Panel in effect wipes out the non-compliance by the parties in concert as to the general principles and rules of the Code in particular their failure to extend the mandatory offer. This in fact has been made very clear in the second paragraph of their letter dated 5 September 1991. It cannot be said that in doing so, the Panel had made a jurisdictional error, as the law is clear that the Panel has the sole power to administer the Code for all take-over and merger transactions, and at the same time there also appears to be no error of law not going to jurisdiction. The Panel had also maintained their stand despite subsequent correspondence and meetings between the plaintiff and the Panel after 5 September 1993 when the plaintiff sought further clarification in the matter. On this premise, there is absolutely no reason for this Court to intervene in the matter.

The plaintiff argues that it is illogical and unsatisfactory to draw the conclusion that a public censure can remove the very obligation the breach of which had caused the sanction in the first place. The obligation, they maintain, is a consequence of the breach and not the punishment and therefore even with the public censure which serves as punishment, the obligation continues as long as the breach continues. The plaintiff had also reiterated that by stating that the public censure had abrogated the obligations under the Code, the Panel was amending the rule which they had no power to do instead of merely interpreting it.

The plaintiff had concluded by stating:

(a) no judicial review of the Panel is sought;
(b) the consequences of registering transfers of shares by the defendants is of direct concern to the plaintiff in the light of r. 34.7 of the Code;
(c) the plaintiff doubts whether an opinion, decision or ruling expressed by the Panel on the consequences of the exercise of statutory powers under s. 179(7A) of the Act is within the functions of the Panel in law;
(d) in the light of paragraph (c), the clause in s. 179(8) of the Act does not make the Panel immune from suit in relation to an act outside its function;
(e) if the Panel acted outside its functions, the transfers presented to the plaintiff are contrary to r. 34.7 of the Code and thus contrary to s. 179(3)(a) of the Act;
(f) the Panel does appear to have acted outside its statutory functions if its view on the consequences of a public censure are intended to be a ruling under s. 179(4) of the Act and if so r. 34.7 of the Code still applies; and
(g) if the Panel was expressing a mere opinion on the effect of the public censure, it was not a decision and r. 34.7 of the Code still applies.

In the final analysis, my view was that the Panel, in stating that the public censure meant that the parties acting in concert need not comply with r. 34.7 of the Code, was not merely expressing a mere opinion on the effect of the public censure but was actually making a ruling and a decision, which it had the power to make under s. 179(4)(a) and s. 179(7A) respectively of the Act, the latter incidentally having been added in on 1 February 1987 to overcome a situation like this, and my finding is that this is quite in order and in line with the Code and the Act.

The court is disregarding the English authorities relating to decisions of the Panel of Take-overs and Mergers in England as subsections (4) to (9) of s. 179 of the Act are not included in the relevant English legislation. It is of the opinion that the discretion to grant a declaration cannot be exercised where it affects a party who is not a party to the action namely the Panel based on the ruling in *Majumder v. A.G. Sarawak* [1967] 1 MLJ 101; [1969] 1 MLJ 132 or where there is a more appropriate alternative remedy, like *certiorari*, available as discussed and decided in *Eshah bte Sa'at v. Meriam bte Sa'at* [1975] 1 MLJ 97 and *Sungei Wangi Estate v. Uni* [1975] 2 MLJ 136. In *Cox v. Green* [1966] 1 AER 268, it was held that

> on its true construction, RSC, O. 15 r. 17 (O. 15 r. 16 of our Rules of the High Court 1980), was limited to an action or proceeding in which the grant of the declaration sought would not be contrary to the accepted principles on which the court exercised its jurisdiction, one of those principles being that the court would not make a declaration in a dispute which was not a justiciable dispute.

In our instant case, the problem here cannot be said to amount to a justiciable dispute as the Code had been framed in non-technical language and is considered more a gentleman's guide to self-discipline and concerned with the observance of good business standards and practices or ethics for the conduct of take-overs and mergers rather with the enforcement of the law. In the circumstances, the test applicable as to whether a body of persons like the Panel is subject to judicial review is the source of its power which in this case is contractual similar to the Kuala Lumpur Commodity Exchange and the Supreme Court had ruled in *Ganda Oil Industries Sdn. Bhd. & Ors v. Kuala Lumpur Commodity Exchange & Anor.* [1988] 1 MLJ 174 that the Exchange's decision on the act which is the subject of the challenge is, by its nature, not and should not be made amenable to judicial review.

At Chapter 5 of P.W. Young's **Declaratory Orders**, it is stated that

> It has been seen that the court has almost unlimited jurisdiction to grant declaratory relief though it may, in its discretion, decline to exercise that jurisdiction. There may, however, be certain circumstances in which the court's *prima facie* jurisdiction is taken away by provision in some statute. Such statutory exclusion may take the form of a direct prohibition. Such provisions will speak for themselves. On the other hand, there are various provisions in statutes which may by necessary implication exclude the court's power to make declarations. However, the court will not lightly infer that its jurisdiction has been excluded: clear words are necessary to oust the jurisdiction.

The relevant statute law applicable here has made the position very clear that the court should not interfere in matters like these.

To hold that the Panel is subject to the supervisory function of the court would be to extend the jurisdiction that was never intended by Parliament when it provided for the establishment of the Panel and the formulation of the Code. The intervention of the court in reviewing the decisions of rulings of the Panel which is a self-regulating body would at best impede, or at the worst frustrate, the purposes for which the Panel existed.

In the event, since there was no merit in the third prayer and consequently no necessity for the first and second prayers to be granted, I had dismissed the originating summons with costs.